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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSE RANGEL-ESPARZA,

Defendant.

3:16-cr-00037-RCJ-VPC-2

ORDER

13 Pending before the Court is Defendant's Motion to Vacate, Set Aside or Correct Sentence
14 pursuant to 28 U.S.C. § 2255 (ECF No. 63). Defendant argues that he did not receive
15 constitutionally effective assistance counsel. For the following reasons, the Court disagrees.

16 **I. FACTS AND PROCEDURAL BACKGROUND**

17 On May 20, 2016, Defendant was pulled over while transporting drugs from California to
18 Chicago. (Plea Agreement 4:3–6:19, ECF No. 42.) Inside the vehicle, law enforcement officers
19 found five kilograms of heroin and over 23.1 kilograms of methamphetamine hidden inside a
20 Fisher Price child's chair box, a Pampers diaper box, a black duffle bag, and a black shopping
21 bag. (*Id.* 5:18–6:5.) The drugs were organized in twenty-nine individually wrapped packages,
22 each package containing approximately 1,000 grams of narcotics. (*Id.* 5:22–6:4.) Defendant was
23 indicted by a grand jury on two counts of Possession with Intent to Distribute a Controlled
24

1 Substance in violation of U.S.C. § 841(a)(1), (b)(1)(A)(vii), and (b)(1)(A)(i). (Indictment 1:18–
2 2:7, ECF No. 19.)

3 Pursuant to a plea agreement, Defendant pled guilty to one count of Illegal Use of a
4 Communication Facility in violation of 21 U.S.C. § 843(b). (Am. J. 1–3, ECF No. 61.) Under the
5 plea agreement, Defendant waived his right to appeal any aspect of his conviction and sentence
6 and waived all collateral challenges, except those involving “non-waivable claims of ineffective
7 assistance of counsel.” (Plea Agreement 11:23–12:5.) The plea agreement also specifically listed,
8 under designated headings, the maximum statutory penalty for Illegal Use of a Communication
9 Facility—a sentence of four years, a fine of \$250,000 or both—and that the parties were free “to
10 argue for an appropriate sentence.” (*Id.* 10:2–10:20.)

11 At the sentencing hearing, Defendant’s attorney successfully contended that Defendant
12 should not receive the maximum punishment of forty-eight months’ incarceration requested by
13 the Government, and the Court sentenced Defendant to forty months’ imprisonment to be
14 followed by one year of supervised release. (Am. J. 1–3; Sent’g Hr’g 2:11:48 p.m.–2:29:15 p.m.,
15 May 15, 2017.) Defendant was not ordered to pay any fine or restitution. (Am. J. 6, ECF No. 61.)

16 **II. LEGAL STANDARDS**

17 A knowing and voluntary waiver of the right to appeal or bring a post-conviction
18 collateral attack is valid and enforceable. *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.
19 1993) (“‘The right of appeal, . . . in criminal cases, is purely a creature of statute’ . . . [, and a]
20 knowing and voluntary waiver of a statutory right is enforceable” (quoting *Abney v. United*
21 *States*, 431 U.S. 651, 656 (1977)); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir.
22 1990) (“[N]othing precludes a defendant from waiving a statutory right, specifically the right to
23 appeal.”); *see also United States v. McTiernan*, 552 F. App’x 749, 750 (9th Cir. 2014)
24 (upholding a waiver of the right to bring a post-conviction collateral attack). However, the Ninth

1 Circuit has held that waiver of the right to appeal or bring a post-conviction collateral attack does
2 not “categorically foreclose[a defendant] from bringing any section 2255 proceeding, such as a
3 claim of ineffective assistance of counsel or involuntariness of waiver.” *Abarca*, 985 F.2d at
4 1014.

5 Under 28 U.S.C. § 2255, a prisoner in custody under a federal sentence may move the
6 sentencing court to vacate, correct, or set aside a sentence that was imposed in violation of the
7 Constitution or laws of the United States, was imposed by a court without proper jurisdiction,
8 was in excess of the maximum sentence authorized by law, or is otherwise subject to collateral
9 attack. 28 U.S.C. § 2255(a). However, § 2255 motions may be constrained by voluntary waiver
10 and procedural rules. Issues “clearly contemplated by, and subject to, [a] plea agreement waiver”
11 cannot be brought in a § 2255 motion. *Abarca*, 985 F.2d at 1014. Likewise, issues decided on
12 direct review, or which could have been raised on direct review but were not raised, also cannot
13 be brought in a § 2255 claim. *Reed v. Farley*, 512 U.S. 339, 358 (1994). The former kind of
14 claims are res judicata, and the latter kind of claims are said to be “procedurally defaulted” and
15 cannot be raised later in a collateral attack. *See id*; *Massaro v. United States*, 538 U.S. 500, 504
16 (2003). There are exceptions to the procedural default rule, however, when a defendant can
17 show: (1) “cause and actual prejudice;” or (2) “actual innocence.” *McTiernan*, 552 F. App’x at
18 750 (quoting *Bousley v. United States*, 523 U.S. 613, 622 (1998)).

19 Ineffective assistance of counsel is sufficient “cause” to excuse procedural default.
20 *United States v. Skurdal*, 341 F.3d 921, 925–27 (9th Cir. 2003). Thus, ineffective assistance of
21 counsel claims can be brought for the first time under § 2255 even if they could also have been
22 brought on direct appeal. *Massaro*, 538 U.S. at 504.

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1 **III. DISCUSSION**

2 **a. Section 2255 Motion**

3 Defendant claims that his attorney committed ineffective assistance of counsel. The Court
4 disagrees: Defendant received constitutionally effective assistance of counsel.

5 For ineffective assistance of counsel claims, the Sixth Amendment right to effective
6 counsel is violated when: (1) counsel's performance was so deficient so as not to constitute the
7 "counsel" guaranteed by the Sixth Amendment; and (2) the deficiency prejudiced the defense by
8 "depriv[ing] the defendant of a fair trial, a trial whose result is reliable." *Strickland v.*
9 *Washington*, 466 U.S. 668, 687 (1984). There is a "strong presumption" of reasonable
10 professional conduct. *Id.* at 698. When this presumption is overcome and an attorney's
11 "unprofessional errors" are such that there is a "reasonable probability" the result would have
12 been different had the errors not occurred, the defendant has been deprived of his Sixth
13 Amendment rights. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). "Reasonable
14 probability" is a lower standard than "more likely than not." *Nix v. Whiteside*, 475 U.S. 157, 175
15 (1986). The analysis does not focus purely on outcome. *Lockhart v. Fretwell*, 506 U.S. 364, 369
16 (1993). The error must also have rendered the trial fundamentally unfair or unreliable. *Williams*
17 *v. Taylor*, 529 U.S. 362, 391–92 (2000). Counsel's tactical decisions with which a defendant
18 disagrees do not rise to the level of ineffective assistance unless the decisions are so poor as to
19 meet the general test for constitutionally defective assistance. *See Dist. Attorney's Office for*
20 *Third Judicial Dist. v. Osborne*, 557 U.S. 52, 85-86 (2009).

21 In the present case, Defendant claims that his attorney assured him that he would only be
22 sentenced to probation and that his offense was not a deportable one, so he would not be
23 deported if he pleaded guilty. He further claims that he would not have pleaded guilty if his
24 attorney had not made those assurances to him. However, the record belies Defendant's claims.

1 In the signed plea agreement, Defendant explicitly made the following admissions: first,
2 he acknowledged that the Court had “discretion to impose any reasonable sentence up to the
3 maximum term of imprisonment permitted by law;” second, he stated in the agreement that he
4 “understands and acknowledges that if he is not a United States citizen, then it is highly probable
5 that he will be permanently removed (deported) from the United States as a consequence of
6 pleading guilty;” third, he asserted that he “desires to plead guilty regardless of any immigration
7 consequences that may result from his guilty plea, even if the consequence is automatic removal
8 from the United States with no possibility of returning;” fourth, he acknowledged that he
9 “specifically discussed these removal/deportation consequences with his attorney;” and fifth, he
10 affirmed that “[n]o promises, agreements or conditions other than those set forth in this
11 agreement have been made or implied by the defendant, the defendant’s attorney or the United
12 States, and no additional promises, agreements or conditions shall have any force or effect.”
13 (Plea Agreement 7:4–7:8, 12:8–12:16, 12:17–13:2.)

14 At his plea hearing, Defendant affirmed this understanding. The Court confirmed with
15 Defendant that Defendant’s attorney had advised him “regarding the effects of a guilty plea upon
16 deportation and/or loss of residence status,” and “that a guilty plea here may equal revocation of
17 residence rights and/or deportation.” Under oath, Defendant unambiguously stated that he
18 understood that possibility, and he expressed that he understood the terms of the plea agreement.
19 Before the plea agreement was summarized, the Court exhorted Defendant that he had “an
20 obligation . . . to tell [the Court] about any promise that was made . . . that caused [him] to plead
21 guilty.” Defendant acknowledged this obligation, and after the agreement was summarized by
22 the Government, the Court again asked Defendant whether he understood it and whether any
23 other promises were made to him. Defendant confirmed that his understanding was consistent
24 with the Government’s summary and explicitly stated that “[n]o other promise [existed].” In

1 addition, before he was sentenced, the Court clearly explained and Defendant expressly
2 acknowledged that the recommendation by the parties was not binding on the Court and that the
3 Court could impose a sentence higher or lower than the one recommended by the parties. (Tr. of
4 Change of Plea 10:21–10:24, 11:15–11:20, 15:6–15:20, ECF No. 70.)

5 Therefore, when examining the evidence, Defendant has failed to meet his burden.
6 Defendant’s statements in open court contemporaneous with his plea, which “carry a strong
7 presumption of verity” and “should be accorded great weight,” clearly contradict Defendant’s
8 allegations. *Blackledge v. Allison*, 431 U.S. 63, 75 (1977) (“[s]olemn declarations in open court
9 carry a strong presumption of verity”); *Chizen v. Hunter*, 809 F.2d 560, 562 (9th Cir. 1987)
10 (“statements made by a criminal defendant contemporaneously with his plea should be accorded
11 great weight”). Accordingly, Defendant has not overcome the “strong presumption” that
12 counsel’s assistance was constitutionally reasonable. *Strickland*, 466 U.S. at 689.

13 CONCLUSION

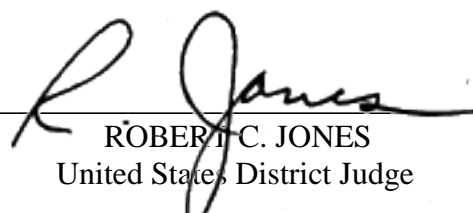
14 IT IS HEREBY ORDERED that the Defendant’s Motion to Vacate, Set Aside or Correct
15 Sentence (ECF No. 63) is DENIED.

16 IT IS FURTHER ORDERED that no certificate of appealability shall issue.

17 IT IS FURTHER ORDERED that the Clerk shall ENTER a separate and final judgment
18 under Federal Rule of Civil Procedure 58(a) as directed by *Kingsbury v. United States*, 900 F.3d
19 1147 (9th Cir. 2018).

20 IT IS SO ORDERED.

21 Dated: This 11th day of March, 2019.

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23 
24 ROBERT C. JONES
United States District Judge